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No. 789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

ALLIS-CHALMERS MANUFACTURING COMPANY; et al.,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENTS, COMMONWEALTH EDISON COMPANY, et al. IN OPPOSITION

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La Salle Street Press—Chicago 10

INDEX

	PAGE
Statute and Rule Involved	1
Argument	2

CITATIONS

Cases:

Alden-Rochelle, Inc. v. ASCAP, 3 F.R.D. 157 (S.D.N.Y. 1942)	3
American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372 (1893)	5
Atlantic City Elec. Co. v. General Elec. Co., 207 F. Supp. 620 (S.D.N.Y. 1962)	12
Barnsdall Refining Corp. v. Birnamwood Oil Co., 32 F. Supp. 308 (E.D.Wis. 1940)	3
City of San Antonio v. General Elec. Co., No. 3063 and related cases (W.D.Tex. Dec. 7, 1962), *application for leave to file interlocutory appeal granted* (5th Cir. Jan. 11, 1963)	3
Department of Water & Power v. Allis-Chalmers Mfg. Co., 1963 CCH Trade Cas. ¶ 70,656 (S.D.Cal. 1963) *application for leave to file interlocutory appeal granted sub nom* Pacific Gas & Elec. Co. v. General Elec. Co. (9th Cir., Mar. 8, 1963)	3
Enrich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951)	5, 6, 9
Federal Trade Comm'n v. Sun Oil Co., 371 U.S. 505 (1963)	11
Hamilton v. Rathbone, 175 U.S. 414 (1899)	12
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	5
Lynch v. Overholser, 369 U.S. 705 (1962)	5, 6, 9
Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956)	13
Northwest Elec. Power Coop. v. General Elec. Co., 30 F.R.D. 557 (W.D.Mo. 1961)	3

PAGE

O'Cedar Corp. v. F. W. Woolworth Co., 66 F.2d 363 (7th Cir. 1933), *cert. denied*, 291 U.S. 666 (1934) 10

Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956), *aff'g* United States v. Rex Trailer Co., Inc., 218 F.2d 880 (7th Cir. 1955) 10

Charles Rubenstein, Inc. v. Columbia Pictures Corp., 289 F.2d 418 (8th Cir. 1961), *aff'g* 176 F. Supp. 527 (D.Minn. 1959) 10

Sacramento Mun. Util. Dist. v. Westinghouse Elec. Corp., 1962 CCH Trade Cas. ¶ 70,552 (N.D.Cal. 1962) 4

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 11, 13

Simco Sales Service of Pennsylvania, Inc. v. Air Reduction Co., 1963 CCH Trade Cas. ¶ 70,638 (E.D.Pa. 1963) 4

Standard Oil Co. v. Clark, 163 F.2d 917 (2d Cir. 1947), cert. denied, 333 U.S. 873 (1948) 10

Sturges v. Crowninshield, 4 Wheat. 122 (1819) 12

Sunshine Biscuits, Inc. v. Federal Trade Comm'n., 306 F.2d 48 (7th Cir. 1962) 11

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952) 10

Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366 (D. Minn. 1939) 3

United States v. Beatty, 232 U.S. 463 (1941) 5

United States v. Brunswick-Balke-Collender Co., 1962 CCH Trade Cas. ¶ 70,282 (E.D.Wis. 1962) 8

United States v. Cigarette Merchandisers Ass'n, Inc., 136 F.Supp. 212 (S.D.N.Y. 1955) 8

United States v. B. F. Goodrich Co., 1957 CCH Trade Cas. ¶ 68,713 (D.C.Colo. 1957) 8, 12

United States v. International Bldg. Co., 345 U.S. 502 (1953) 10

PAGE

United States v. Safeway Stores, Inc., 20 F.R.D. 451 (N.D.Tex. 1957) 8

United States v. Standard Ultramarine & Color Co., 137 F.Supp. 167 (S.D.N.Y. 1955) 12

Webster-Rosewood Corp. v. Schine Chain Theatres, Inc., 157 F.Supp. 251 (N.D.N.Y. 1957), *aff'd*, 263 F.2d 533 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959) 10

Miscellaneous:

51 Cong. Rec. (1914) at:

15826 12
15938 12
15988 12
16009 12
16042 12
16047 12
16061 12
16156 12

Federal Rules of Criminal Procedure:

Rule 11 ..... 2, 6, 7, 9
Rule 19 ..... 2, 3

Hearings before Judge Ganey, November 21, 1960 8

New York University School of Law, Proceedings of the Institute on Federal Rules of Criminal Procedure, Vol. VI (1946) 7

Statutes:

Clayton Act, Section 5(a), 69 Stat. 282 (1955), 15 U.S.C. § 16(a) 3, 4, 5, 6, 7, 9, 10, 11

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STATUTE AND RULE INVOLVED

Section 5(a) of the Clayton Act, 69 Stat. 283 (1955), 15 U.S.C. § 16(a), reads as follows:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15a of this

title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided:* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 15a of this title."

The full text of Rule 11 of the Federal Rules of Criminal Procedure is as follows:

> "A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

ARGUMENT

The petition lacks a concise, explicit statement of reasons why a writ of certiorari should be granted and this is undoubtedly due to the fact that there are no compelling reasons for granting the writ. Rather than squarely facing the criteria set forth in Rule 19, the petition attacks the merits of the court of appeals' opinion in an oblique, but unsuccessful, effort to create a conflict with decisions of this Court. And even though the petition is essentially a brief on the merits of the decision below, it remains apparent that the decision is correct.

I. THE PETITION FAILS TO STATE GROUNDS WHICH JUSTIFY GRANTING A WRIT OF CERTIORARI

The only indication of what petitioners may contend are reasons for granting a writ of certiorari are the three arabic

numerals dispersed intermittently throughout their argument. (Pet'n pp. 7, 9-12) The first of the three introduces the allegation that the "holding of the court below is contrary to that reached and respected in earlier decisions and to those of recent district court decisions." (p. 7)

The vague reference to contrary "earlier decisions" presumably encompasses the cases cited on page 8 of the petition. Candor should have required petitioners to recognize that the decisions thus relied upon contain only *dicta*, not holdings, on the question presented by the petition.[1]

Furthermore, the only conflicts countenanced by Rule 19 as justification for certiorari are either (i) a conflict with a decision of another court of appeals, or (ii) a conflict with a decision of this Court. Petitioners do not, and cannot, point to either.[2]

Moreover, the conflicting district court rulings cited by petitioners,[3] which were considered and rejected by the

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[1] In *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), the case upon which petitioners rely most heavily, the only issue before the court was the effect of a *nolo contendere* plea under the proviso. Statements therein respecting the effect of guilty pleas are not rulings, but *dicta*. The same is true with respect to *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 208 (E.D. Wis. 1940) and *Alden-Rochelle, Inc. v. ASCAP*, 3 F.R.D. 157 (S.D. N.Y., 1942). In *Northwest Elec. Power Coop. v. General Elec. Co.*, 30 F.R.D. 557, 558-59 (W.D. Mo. 1961), the motion was filed by two corporate defendants who had pleaded *nolo contendere* and the court ruled that the references to the criminal proceedings were immaterial and prejudicial to *those* defendants. Accordingly, the case appears to be limited to the view that *nolo contendere* pleas lead to consent judgments.

[2] Petitioners' repeated citations in the petition of *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939) misleadingly indicate that the district court's ruling with respect to the proviso to Section 5(a) was affirmed by the Court of Appeals for the Eighth Circuit. (Pet'n. pp. 8, 11) The fact is that the district court's ruling respecting the proviso was not appealed and the affirmance by the Court of Appeals was concerned entirely with other questions.

[3] *Department of Water & Power v. Allis-Chalmers Mfg. Co.*, 1962 CCH Trade Cas. ¶ 70,656 (S.D. Cal. 1963) (application for leave to file interlocutory appeal granted *sub nom. Pacific Gas & Elec. Co. v. General Elec. Co.* (9th Cir., Mar. 8, 1963); *City of San Antonio v. General Elec. Co.*, No. 3063 and related cases (W.D. Tex., Dec. 7, 1962) (application for leave to file interlocutory appeal granted (5th Cir. Jan. 11, 1963)

court of appeals below, are being reviewed on appeals now pending before the court of appeals for the Fifth and Ninth Circuits. There is no basis for presuming at this time that either court will reach a result in conflict with the Seventh Circuit. Therefore, it is premature to contend that certiorari need be granted to achieve uniformity of construction.

Candor might also have required petitioners to call to the Court's attention the district court opinions squarely holding, as did the court below, that judgments entered on guilty pleas are not "consent judgments" within the meaning of the proviso to Section 5(a): *Sacramento Mun. Util. Dist.* v. *Westinghouse Elec. Corp.*, 1962 CCH Trade Cas. ¶ 70,552, at p. 77,225 (N.D. Cal. 1962); *Simco Sales Service of Pennsylvania, Inc.* v. *Air Reduction Co.*, 1963 CCH Trade Cas. ¶ 70,638, at pp. 77,602-03 (E.D. Pa. 1963).

Petitioners' allegation that it is important to resolve the question here presented prior to trial (Pet'n. p. 6) is not consistent with their lack of diligence in these proceedings. As petitioners well know, the expensive national discovery program provided for the mass of electrical equipment cases is drawing to a close in the immediate future. A target date of May 1, 1964 has already been established for trial of some of the complaints affected by the decision below. If certiorari is granted from the interlocutory ruling, such trials, and perhaps numerous others, might be indefinitely delayed. Since denial of a petition for rehearing by the court of appeals is not a condition precedent to review by this Court, petitioners could have expedited the petition by foregoing the petition for rehearing. Instead, however, petitioners requested and obtained an extension of time to petition for rehearing. Then the petition for certiorari was not filed until the full 90 days after entry of the order denying

rehearing. When petitioners had knowledge that a delay in the decision of this cause could affect the orderly progress of widespread litigation, petitioners had the duty to take every reasonable step to submit their petition to the Court at the earliest possible date. Having failed to meet this obligation, petitioners cannot now rely on the argument that this Court must grant their petition to resolve the question before trial.

In addition, the ruling below is interlocutory. It does not affect the jurisdiction of the district court and reversal would not render trial unnecessary. Nor would any judgment rendered after trial conducted in conformity therewith necessarily be rendered void if there were error in the interlocutory ruling. These facts alone justify denial of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *United States* v. *Beatty*, 232 U.S. 463, 468 (1914); *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). This is particularly true here, where granting certiorari could delay prompt trial of numerous cases.

Petitioners also argue that the decision below "overlooks the necessary effect of this Court's decision in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951) on the construction of the proviso" (p. 9) and "conflicts with principles enunciated in this Court's decision in *Lauch* v. *Overholser*, 369 U.S. 705, 719 (1962)" (p. 13). These contentions are made in passing deference to Rule 19, representing vain attempts to create a conflict "with applicable decisions of this court." However, as petitioners initially acknowledged, the proviso to Section 5(a) was "never before considered by this Court" (Pet'n, p. 8), and, as shown in part II hereof, petitioners have not established any conflict with overriding principles enunciated by the Court.

II. RESPONSE TO PETITIONER'S ARGUMENTS RESPECTING THE MERIT OF THE RULING BELOW

Petitioners allege that the decision below conflicts "in principle" (a) with Rule 11 of the Federal Rules of Criminal Procedure and more particularly the Court's statement on the Rule in *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962), and (b) with the Court's interpretation of the main body of Section 5(a) in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951). Analysis shows, however, that the decision below is indeed consistent with, if not required by, the relevant principles enunciated by this Court.

A. Rule 11 of the Federal Rules of Criminal Procedure Expressly Preserved the Plea of Nolo Contendere Because of the Consequences of a Plea of Guilty in Antitrust Cases

The basic purpose of Section 5(a), in recognition of the importance of treble damage actions to effective enforcement of the antitrust laws, is to give persons injured by violations of the antitrust laws the benefit of prior judgments obtained by the Government. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951). A different policy underlies the proviso to Section 5(a): escape from the prima facie effect otherwise accorded under the section was offered to induce defendants to capitulate to the Government's demands, thereby reducing the burden upon the courts and Government in extended trials of antitrust cases.

The ruling of the court below that the exclusionary proviso would apply only to judgments based upon *nolo contendere* pleas and *not* in any event to judgments based upon guilty pleas served to strike a balance between the conflicting purposes inherent in Section 5(a). Since Rule 11 of the Federal Rules of Criminal Procedure provides that the *nolo contendere* plea can be entered *only* with the consent

of the court, this approach affords a safeguard of the public interest and of the congressional purpose to aid injured persons. But if, as petitioners argue, a judgment based on a guilty plea is a "consent judgment," the defendants accused of an antitrust violation would have the unilateral power, by pleading guilty, to avoid the prima facie effect of Section 5(a).

The *nolo* plea was preserved in Rule 11, adopted in 1945, primarily in recognition of its then well established usefulness in antitrust cases to avoid the consequences of a guilty plea under Section 5(a). This is made exceedingly clear in the report of Proceedings of the Institute on the Federal Rules of Criminal Procedure where the Hon. E. Aaron Youngquist commented on the retention of the *nolo* plea:

> "... it was thought by the Committee that this particular plea should be retained because of the effect of a plea of guilty in an anti-trust case, for instance, and the implication that arises from the Clayton Act and all those things. It is used and has been used in the past to a very considerable extent." *New York University School of Law, Proceedings of the Institute on Federal Rules of Criminal Procedure*, Vol. VI, p. 162 (1946)
>
> "[Retention of the *nolo* plea] was designed primarily to deal with the consequence of a plea of guilty in a criminal anti-trust case in connection with a treble damage suit following it, and it was thought that for practical purposes it would be better to let a corporation, for instance, charged with the violation of the anti-trust laws plead *nolo contendere* rather than to plead guilty because of the consequences that might follow." (*Id.* at 188).

This explicit statement of the public policy behind the retention of the *nolo* plea has subsequently been acknowl-

edged in decisions of several district courts: *E.g. United States* v. *Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 212-13 (S.D.N.Y. 1955); *United States* v. *B. F. Goodrich Co.*, 1957 CCH Trade Cas. ¶ 68,713 at p. 72,878 (D.C. Colo. 1957); *United States* v. *Safeway Stores, Inc.*, 20 F.R.D. 451 (N.D. Tex. 1957); *United States* v. *Brunswick-Balke-Collender Co.*, 1962 CCH Trade Cas. ¶ 70,282 (E.D. Wis. 1962).

This distinction between the consequences of a plea of guilty and a plea of *nolo contendere* was recognized by counsel for the defendants in these proceedings when the pleas were proferred in the criminal cases. Thus, counsel for Federal Pacific said:

> "If Your Honor, by refusal to accept nolo pleas, places a smaller company like this in great jeopardy as a result of litigation which might result from these indictments by forcing a plea of guilty, Your Honor may put Federal Pacific Electric Company in the position where it will be either driven out of business or so severely injured that it could provide no competition of any kind . . .
>
> "This is a basic reason why I think Your Honor ought to accept a plea of nolo." *Hearings before Judge Ganey*, November 21, 1960, p. 214.

Similarly, counsel for General Electric stated:

> ". . . I hope Your Honor realizes that if corporations are permitted to plead nolo contendere and G.E. and Westinghouse are not, it is not just a question of relieving those corporations of a treble damage liability, but it is a determination by Your Honor that a great proportion of that damage must be assessed against General Electric and Westinghouse. I suggest that the pleas are not to be used as the basis for bargaining among corporate defendants on the question of subsequent liability in litigation not yet brought." *Hearings before Judge Ganey*, November 21, 1960, p. 262.

Contrary to the thrust of petitioners' argument, the traditional distinction between guilty and *nolo contendere* pleas incorporated into Rule 11 was not affected by the Court's decision in *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962). That opinion recognizes only that there may be exceptional circumstances under which a trial judge could refuse a guilty plea and enter a not guilty plea. On the other hand, the important and traditional distinction recognized by the court below is that a *nolo contendere* plea cannot be entered under any circumstances without the prior consent of the court and the prerequisite consent limits use of the *nolo* plea to instances where it serves the public interest.

B. The "Estoppel Clause" in Section 5(a) Does Not Require that the Proviso be Construed to Apply to Judgments Entered after a Guilty Plea

Petitioners' estoppel argument starts with the assumption that the "estoppel clause" in the main provision of Section 5(a)[4] means no more than collateral estoppel by judgment.[5] From this assumption they argue that judgments based on pleas of *nolo contendere* are inadmissible because of the estoppel clause, and therefore the exclusionary proviso must be construed to encompass judgments based on guilty pleas in order to avoid redundancy.

However, the "estoppel clause" obviously refers to the sum of the concepts included within the doctrine of res judicata. This is the only explanation which takes cognizance of the fact that consent judgments, in the proper

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[4] "A final judgment or decree heretofore or hereafter rendered . . . shall be prima facie evidence against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel . . ."

[5] The question involved here was neither raised nor considered in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), the principal authority cited by petitioners in support of their basic assumption. The *Emich* case was concerned solely with the use under Section 5(a) of a judgment entered after conviction on a *not guilty* plea.

sense of the term, are admissible under Section 5(a) in treble damage suits where such judgments have been entered after testimony is taken." And it is indisputable that Congress intended in Section 5(a) to exclude "consent judgments" only when they are entered before any testimony has been taken. Since the taking of testimony does not create an estoppel where none would otherwise exist, the "estoppel clause" cannot be limited in meaning to only collateral estoppel by judgment. In fact, in order to effectuate the Congressional purpose of inducing capitulation to Government suit without expense of trial as expressed in the proviso, the "estoppel clause" must be construed as referring to the entire doctrine of res judicata. Otherwise, defendants could completely defeat both purposes of Section 5(a) by "consenting" to the judgment demanded by the Government, or pleading *nolo contendere* in a criminal prosecution, *after* the Government had presented its case.

Consent decrees, in the proper sense of that term, *United States* v. *International Bldg. Co.*, 345 U.S. 502, 506 (1953); *Standard Oil Co.* v. *Clark*, 163 F.2d 917, 939 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948); *O'Cedar Corp.* v. *F. W. Woolworth Co.*, 66 F.2d 363, 366 (7th Cir. 1933), *cert. denied*, 291 U.S. 666 (1934); and judgments entered after *nolo contendere* pleas, *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148, 149 (1956), *aff'g. United States* v. *Rex Trailer Co., Inc.*, 218 F.2d 880 (7th Cir. 1955), are both res judicata. Accordingly, they meet all of the requirements for admissibility under the main body of Section 5(a) and the proviso is essential to exclude them when they are *entered before any testimony has been taken.*

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[1] *E.g., Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 289 F.2d 418, 422 (8th Cir. 1961), *aff'g.* 176 F. Supp. 527, 536 (D. Minn. 1959); *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, 853 (8th Cir.) *cert. denied*, 342 U.S. 942 (1952); *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 157 F. Supp. 251, 254-56 (N.D. N.Y. 1957), *aff'd.* 263 F.2d 533 (2d Cir.) *cert. denied*, 360 U.S. 942 (1959).

Thus, there is no redundancy in the proviso and there can be no justification for resort to legislative debates to alter its plain meaning in order to bring judgments on guilty pleas within the concept of a "consent judgment."

In fact, petitioners' redundancy argument is confounded by their own contention that a judgment entered on a guilty plea is a "consent judgment." If judgments entered on guilty pleas are "consent" judgments, then they would create no estoppel for the same reasons as are applicable to any consent judgment in the proper sense of the term. Thus, as interpreted by petitioners, the proviso becomes not only redundant, but completely meaningless, because all civil consent judgments and criminal judgments entered on pleas of either guilty or *nolo contendere*, before or after testimony has been taken, would be inadmissible under the estoppel clause in the main body of Section 5(a).

C. The Legislative History is Not Authoritative on the Construction of Section 5(a) and Cannot be Used to Overturn Clear Statutory Language

It is not the statutory language, but legislative history upon which petitioners rely to support their contention that the exclusionary proviso extends to judgments entered on pleas of guilty. If we look to the language of the statute itself and give the phrase "consent judgments and decrees" its normal and customary meaning (*Federal Trade Comm'n* v. *Sun Oil Co.*, 371 U.S. 505, 512, 514 (1963); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 388 (1951)), it is clear that the proviso does not apply to judgments on guilty pleas. Where the statutory language is clear and unambiguous resort to legislative history is unwarranted. *Sunshine Biscuits, Inc.* v. *Federal Trade Comm'n*, 306 F.2d

48, 51 (7th Cir. 1962); *Sturges v. Crowninshield*, 4 Wheat. 122, 202 (1819); *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). In any event, the legislative history would have to be both authoritative and exceedingly clear in order to justify a judicial construction which is contrary to the normal and customary meaning of the statutory language.

The legislative history of Section 5 fails to meet either standard. The legislative history has now been examined by a number of district courts and virtually all frankly recognize the "perplexing problems" which it presents. (Pet. App. 71a; *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D. N.Y. 1955); *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620, 625 (S.D. N.Y. 1962); *United States v. B. F. Goodrich Co.*, 1957 CCH Trade Cas. ¶ 68,713, at p. 72,877 (D. Colo. 1957).

The confusion and conflicting opinions are the inevitable result of the fact that the legislative history consists, not of studied, written Committee reports, but solely of ambiguous statements made during the floor debates. It is not difficult to demonstrate the implausibility of any assumption that the Senate heard or understood, let alone agreed with, petitioners' tortured construction of "consent judgments or decrees." Repeated quorum calls were necessary because of the lack of attendance during the filibuster engaged in by Senators opposing the Clayton Act, 51 Cong. Rec. 15826, 15988, 16009, 16042, 16061, 16156 (1914); and the inattention of the handful of Senators who were present from time to time is also evident from the Congressional Record. 51 Cong. Rec. 15938, 16047 (1914).

While petitioners purport to rely upon statements of Senate proponents of the Clayton Act, there can be no doubt that support for the petitioners' view is limited to statements by the opposition Senators who were attempting to prevent enactment of Section 5. Petitioners thus ride

upon the proponents and the entire Senate the burden of correcting every misstatement of the opposition Senators at the peril of having those statements used as the basis of overturning clear statutory language. The argument from such legislative history provides a classic example of the rationale for the rule that the views of the opposition are not authoritative under any circumstances. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 288, n. 22 (1956); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

For the foregoing reasons respondents respectfully suggest that the petition for a writ of certiorari be denied.

Respectfully submitted.

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